Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance	)	WC Docket No. 07-97
Pursuant to 47 U.S.C. § 160(c) in the Seattle	)	
Washington Metropolitan Statistical Area	)	

Comments of the
Washington Utilities and Transportation Commission

August 29, 2007
Olympia, Washington

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Summary

The Washington Utilities and Transportation Commission ("UTC") respectfully submits these comments in the above-captioned proceeding. On April 27, 2007, Qwest Corporation ("Qwest") filed a petition ("Seattle Petition") pursuant to Section 10 of the Communications Act of 1934 as amended ("Act"), requesting the Federal Communications Commission ("Commission") to forbear from applying a broad swath of federal regulations that currently apply to its interstate service offerings in the Seattle Metropolitan Statistical Area ("Seattle MSA"). The UTC recommends that the Commission deny the Seattle Petition because the scope of the relief Qwest requests would substantially impede or entirely eliminate intra-modal telecommunications competition in the Seattle MSA.

Introduction

Qwest petitions the Commission to forbear from continuing to apply a broad range of federal regulations to its operations in the Seattle MSA. The Seattle Petition

uses Section 10 of the Act as the basis for eliminating existing statutory obligations applied to its interstate service offerings, including unbundled loops and transport and special access services sold to end users and competitors.

The Seattle Petition is joined by companion forbearance petitions for Qwest's operations in the Phoenix, Minneapolis/St. Paul, and Denver MSAs. Collectively, the petitions come on the heels of action the Commission took in 2005 on a similar petition regarding Qwest's operations in Omaha, Nebraska. The Commission's order on Omaha, by its own terms, is not precedent and specifically states that petitions for other areas, such as the Seattle Petition, must be evaluated based on the circumstances in those areas.[1]

The UTC has grave concerns regarding the scope of Qwest's Seattle Petition and the adverse effects it will have on competition if granted in whole. The Washington Legislature has given the UTC statutory authority to regulate telecommunications companies in the public interest and promote diversity in the supply of telecommunications services throughout the state. In doing so, the UTC is also allowed to permit flexible regulation of competitive telecommunications companies and services[2]

In several regulatory proceedings over the past decade, the UTC has endeavored to establish balanced policies to ensure that effective competition develops in the state wherever possible and to ensure conditions that promote competition. Additionally, as competition has developed in Washington, the UTC has actively responded to efforts by incumbent local exchange carriers (Incumbent LECs or ILECs), particularly Qwest, to reduce, streamline or eliminate state regulation where conditions warrant. The evidence

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[1] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum and Opinion and Order*, 20 FCC Rcd 19415 (2005) ("Omaha Order").

[2] RCW 80.36.300(5) and (6).

Qwest presented to the UTC as part of these investigations demonstrated that competitors rely on UNEs to enable them to offer telecommunications end-users effectively competitive alternatives to Qwest services. However, the vast scope of the relief Qwest seeks in the Seattle Petition, if granted, would undercut the very foundation and delicate balance of the UTC's past decisions regarding reduced or streamlined state regulation of Qwest's services. Accordingly, as discussed more fully below, the UTC opposes Qwest's Seattle Petition to the extent that it seeks forbearance from the unbundling obligations of Section 251(c) and Part 61 of the Commission's regulations as they apply to Qwest's interstate switched and special access services.

The Seattle Petition

An ILEC requesting forbearance must show that three elements of Section 10 of the Act are satisfied. In particular, Section 10(a) provides that the Commission shall forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of the carriers' geographic markets, if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[3]

In the Seattle Petition, Qwest argues that mass market consumers have access to a wide range of competitive alternatives including cable TV providers, wireline competitive local exchange carriers (CLECs), wireless carriers, and voice over internet protocol (VOIP) providers, and that extensive wholesale alternatives are available to its competitors. Qwest similarly argues that enterprise consumers have access to a range of competitive options including cable TV providers, CLECs, VOIP providers and competitive fiber-based alternatives. To support its position, Qwest cites the apparent decline in the number of mass market and enterprise access lines it serves as evidence of robust competition in those market segments, particularly competition from wireline carriers and intermodal competitors.

As a consequence, Qwest seeks forbearance from applying the following:

- Loop and transport unbundling obligations pursuant to 47 U.S.C. §251(c)(3);
- Dominant tariffing requirements and Section 214 procedures for acquiring and disposing of network facilities and discontinuing interstate services;
- Price cap regulation of its interstate switched and special access services; and,
- Existing Computer III requirements including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") services offered pursuant to tariff.

[3] 47 U.S.C. § 160(a). With regard to the public interest determination required by Section 10(a)(3), Section 10(b) requires the Commission to "consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). Further, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.*

Forbearance from Section 251(c)(3) throughout the Seattle MSA is contrary to the public interest and will undermine facilities-based wireline competition for enterprise consumers.

Qwest argues because of growing retail competition primarily from inter-modal competitors that it is no longer necessary or appropriate that it be subject to the unbundled loop, subloop and dedicated transport requirements of Section 251(c)(3) in the Seattle MSA. If Qwest's Seattle Petition were granted, wireline competitors in the Seattle MSA would no longer be able to obtain access to and purchase unbundled loops, subloops or dedicated transport at cost-based rates in and between 26 wire centers in the greater Seattle metropolitan area.

The UTC is particularly concerned about this element of Qwest's petition given its ongoing statutory obligation to promote diversity in the supply of retail telecommunications services. Specifically, a number of wireline companies compete actively in the Seattle MSA. The UTC understands that these competitors rely heavily, and in some cases solely, on the availability of loop and transport UNEs from Qwest to compete, particularly for enterprise customers. Indeed, the evidence on which Qwest relies shows the extent to which Qwest believes competitors are using unbundled loop and transport facilities in the Seattle MSA to serve enterprise customers.[4]

Over the past seven years the UTC has conducted four separate proceedings relating to streamlined or reduced regulations governing Qwest's intrastate service

[4] See Highly Confidential Exhibit 2 to the Declaration of Robert H. Brigham and David L. Teitzel Regarding the Status of Competition in the Seattle Washington Metropolitan Statistical Area, indicating that as of December 2006 Qwest competitors were using UNE-L and EEL network elements to serve approximately " " business access lines in the Seattle MSA.

offerings in the enterprise marketplace.[5] The proceedings focused in large part on the observed state of competition in certain market segments based on substantial evidence provided by Qwest and other parties as well as the basis on which such competition occurs.[6]

In those proceedings, Qwest introduced evidence regarding the scope of UNE-based competition from CLECs in addition to some unquantified evidence regarding the extent of inter-modal competition. The UTC granted Qwest's applications for competitive classification of its analog and digital business services based in large measure on evidence introduced in those proceedings about UNE-based competition from wireline competitors. In granting Qwest's applications, the UTC specifically found that UNE-based competition from CLECs provided an effective constraint against the ability of Qwest to exercise market power (i.e., raise its retail prices above competitive levels) for enterprise customers. In particular, in its decision on Qwest's petition for competitive

[5] Dockets UT-000883 (Competitive Classification of Business Services), UT-021257 (Competitive Classification of Digital Switched Service, Integrated Digital Switched Network Services, and Uniform Access Solution), UT-030614 (Competitive Classification of Basic Business Exchange Telecommunications Services), and UT-050258 (Competitive Classification of Digital Business Switched and Private Line Services).

[6] RCW 80.36.320 and 80.36.330 provide that the UTC may classify telecommunications companies and services as competitive, *if* the service is subject to effective competition. The latter prerequisite is significant. Effective competition means that customers of the service have reasonably available alternatives, and the service is not provided to a significant captive customer base. The factors that the UTC may consider include, but are not limited to: (1) the number and size of alternative providers; (2) the extent to which services are available from such providers; (3) the ability of such providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions; and (4) other indicators of market power, including market share, growth in market share, ease of entry, and affiliation of providers of service. When the UTC classifies companies or services as competitive, it is allowed to waive other regulatory requirements if this will serve the public interest. The UTC also retains the authority to reclassify competitive companies or services, and to revoke waivers of regulations previously granted, if such reclassification or revocation is necessary to protect the public interest.

classification of basic business exchange services in Docket UT-030614, the UTC observed that:

> Business analog services provided by CLECs—whether through UNE-P, UNE-L, special access lines, resale, or CLEC-owned facilities—are genuine alternatives (essentially complete substitutes) to the Selected Services. Competitors provide these services in all but one Qwest exchange, and the exchanges where competitors are active cover 99.97% of Qwest's analog business lines. The competitors enjoy a 28% market share for these services in Qwest's service territory. Between 27 and 40 competitors are active in the state, ranging from small, "niche" competitors to some of the largest telecommunications companies in the world.
>
> Because of the pro-competitive market structure in Washington, the competitors' means of competition—UNE-P, UNE-L, resale, and CLEC-owned facilities—all help to discipline the market. That is, they serve as an effective restraint on Qwest's ability to raise prices above competitive levels.[7]

Thus, it was the presence and scope of UNE-based competition from CLECs that was the primary basis for granting Qwest's competitive classification requests which effectively put the regulatory classification and treatment of Qwest's retail business services on equal footing with Qwest's competitors in Washington.

While the UTC's competitive classification proceedings were taking place, the Commission was engaged at the federal level in its own important assessment of UNE-based competition. In February 2005, the Commission released the Triennial Review Remand Order ("TRRO Order") in which it revised the conditions under which incumbent LECs, including Qwest, must make unbundled loop and transport facilities available to competitors at cost-based rates.[8] In the TRRO Order, the Commission adopted new rules applicable to incumbent LECs' unbundling obligations using a more

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[7] *In the Matter of the Petition of Qwest Corporation for Competitive Classification of Basic Business Exchange Telecommunications Services*, Docket UT – 030614, Order No. 17, ¶¶ 140-141, released December 22, 2003.

[8] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand.

targeted or granular method for examining conditions in which ILEC unbundling requirements could be lifted. The Commission established wire center-specific criteria for determining where CLECs would not be impaired from competing with incumbents if unbundled high-capacity loops and transport network elements were no longer available. These criteria used the number of access lines and fiber-based collocation arrangements (competitive triggers) to determine impairment for a particular wire center.

In response to the Commission's TRRO Order, and Qwest's self-certification of the wire centers in Washington that it believed met the Commission's competitive triggers, the UTC initiated a proceeding to examine the proper designation of wire centers meeting the Commission's non-impairment standards for UNE loops, high-capacity circuits and transport.[9] As a result, the UTC determined that unbundled high capacity (DS1 and DS3) loops in one wire center and dedicated transport (DS1 and/or DS3) between 12 wire centers would no longer be available to CLECs at cost-based rates.

In contrast to the granular competitive data analysis implemented by the Commission in the TRRO proceeding, the results of which were assessed by the UTC in its own state investigation, Qwest's Seattle Petition is premised on its general view of robust inter-modal competition throughout the state. It is notable that the petition is relatively silent with respect to competitors' reliance on UNEs in the Seattle MSA. Qwest's petition seeks to eliminate all 251(c)(3) obligations for 26 wire centers in the Seattle MSA. This would mark a dramatic expansion of the relief it obtained from the

[9] *See, In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State,* Docket UT-053025, Order No. 6 (December 15, 2006).

UTC less than one year ago for a handful of wire centers pursuant to the TRRO proceeding.

While Qwest's petition includes some evidence regarding inter-modal alternatives it certainly does not contain persuasive evidence showing that competitive alternatives are available throughout the Seattle MSA. As to evidence of inter-modal competition, the petition does not demonstrate that competition from cable TV, wireless carriers, and VOIP providers in the residential telephone market is sufficient to remove regulations designed to promote competition for enterprise customers. Broadly construed data regarding residential competition throughout Washington cannot and do not substitute for the more granular data on which the UTC based its deregulatory orders or the more precise competitive triggers adopted by the Commission in its TRRO Order.[10]

For all of the reasons stated above, as to this component of Qwest's petition, the UTC opposes granting any relief from Qwest's section 251(c) obligations in the Seattle MSA.

Elimination of Part 61 dominant tariff requirements and price cap regulations applied to Qwest's interstate special access services is unwarranted and could be harmful to facilities-based competition.

For mass market and enterprise services, Qwest seeks forbearance from the dominant tariff requirements set forth in Part 61 of the Commission's rules. These rules currently apply to a broad range of Qwest's interstate service offerings including switched and special access services. The UTC understands that CLECs increasingly purchase interstate special access services as a means of obtaining access to "last-mile"

[10] In a stipulation submitted to the UTC in Docket UT-061625, a proceeding involving Qwest's petition to the UTC to operate under and alternative form of regulation ("AFOR"), the company effectively concedes that there is not ubiquitous competition for residential telephone service throughout Washington, given a provision in the stipulation that "stand-alone" telephone service remains subject to tariff during the life of the AFOR.

facilities, particularly where unbundled loop and transport facilities are no longer available as a result of the Commission's TRRO proceeding. Eliminating the obligation to comply with Part 61 regulations would result in a lack of controls over the pricing of interstate special access services on which Qwest's competitors in the Seattle MSA rely. Further, it would mean that Qwest could deaverage or assess higher special access prices to its wholesale competitors compared to those charged to end users.

Beginning in 1991, the Commission began implementing new Part 61 regulations that altered the manner in which incumbent LECs, including Qwest, established special access prices. As opposed to continuing to regulate these services on a traditional rate-base, rate of return basis, the Commission capped existing interstate special access prices and began subjecting them to a formulaic system in which pricing of various special access service elements could be modified. In 1999, the Commission issued its Pricing Flexibility Order which, among other things, began the process of gradually deregulating incumbent LEC special access pricing in MSAs where certain competitive triggers could be met.[11]

For phase I, the Commission granted incumbent LECs were granted significant downward pricing flexibility for interstate special access services, but required that any proposed increases were subject to a capping mechanism that accounted for changes to external cost factors not subject to an incumbent LECs' control. In providing phase II pricing flexibility, the Commission gave incumbents significantly more upward pricing flexibility based primarily on the assumption that competition from other telecommunications providers in the wholesale market would provide an effective

[11] *Access Charge Reform,* CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (Pricing Flexibility Order).

constraint on interstate special access pricing. The UTC understands that Qwest has received phase I pricing flexibility for interstate special access prices but has not yet met the Commission's competitive triggers for phase II flexibility. Thus, with respect to special access pricing conditions in the Seattle MSA, Qwest currently may lower prices to respond to competitive conditions but may increase prices only subject to the phase I capping mechanism.

There is growing concern that existing price cap regulations applying to interstate special access services have not achieved their intended objective. Contrary to the expectations set forth in the Commission's Pricing Flexibility Order, it appears that pricing flexibility has allowed incumbent LECs to raise prices in those areas where competition is ostensibly most vigorous. Indeed, the United States Government Accountability Office ("GAO") recently concluded:

> Since FCC first began granting pricing flexibility in 2001, average revenue from channel terminations and average revenue for dedicated transport across the four major price-cap incumbents has generally decreased. This suggests that average prices may have fallen as well and is generally what would be expected with automatic decreases to price-cap list prices required under FCC's existing CALLS Order. Additionally, the decrease appears to be consistent with the prospect of competition that FCC predicted. *However, our analysis of data from the four major price-cap incumbent firms and FCC, which was intended to determine how prices have changed since the granting of phase II pricing flexibility, generally shows that prices and average revenues are higher, on average, in phase II MSAs – where competition is theoretically more vigorous – than they are in phase I MSAs or in areas where prices are still constrained by the price cap.*[12] [Emphasis added]

[12] See United States Government Accountability Office, GAO Report No. 07-80, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, November 2006.

In 2005, the Commission initiated a broad examination of the regulatory framework to apply to price-capped interstate special access services.[13] Noting that business customers, wireless carriers, interexchange carriers, and CLECs all use special access services as a key input to their retail service offerings, the Commission sought comment on a number of issues regarding interstate special access pricing, including whether existing market data support maintaining, modifying or repealing pricing flexibility rules. The investigation, which is ongoing, is examining observations by some that conditions in the special access market resulting from granting incumbent LECs phase I and phase II pricing flexibility may not have materialized in the manner predicted by the Commission when it last revised its special access pricing regulations.

Recently, in response to further industry consolidation, the Commission asked parties to refresh the record in the Special Access proceeding regarding incumbent LEC pricing practices.[14] It asked parties to comment specifically on the effects of post-Special Access NPRM mergers and industry consolidation on special access facilities and providers, the current state of competition in the special access market, and the extent to which a particular special access service may not be competitive through a showing that a significant number of price cap LECs' customers cannot purchase a comparable service from other telecommunications providers. In recent comments to Congress, the Chairman promised some kind of action on the Special Access NPRM in the fall.

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[13] *Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("Special Access NPRM").

[14] Parties asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, FCC 07-123, July 9, 2007.

Moreover, the National Association of Regulatory Utility Commissions has expressed its concerns regarding special access and currently is examining the competitive issues involving special access in selected markets.[15] Given the broad scope of the Commission's pending investigation, coupled with the GAO recent assessment of interstate special access pricing conditions, the UTC believes it would be both imprudent and premature to eliminate Qwest's obligation to comply with existing Part 61 pricing regulations on special access services provided in the Seattle MSA. As noted above regarding Qwest's efforts to eliminate Section 251(c) unbundling obligations, the Seattle Petition's expansive statements regarding Qwest's view of the state of inter-modal residential competition should not become the basis for eliminating pricing controls on wholesale services used by many of Qwest's competitors to provide retail services to enterprise customers.

Accordingly, the UTC opposes granting forbearance with respect to application of Part 61 regulation to Qwest's interstate special access services.

Wholesale service offerings such as Qwest commercial agreements may not be an effective replacement or meaningful remedy for elimination of UNEs at TELRIC prices or removal of Part 61 regulations applying to interstate special access services.

During proceedings relating to Qwest's efforts to enter the long distance market pursuant to Section 271 of the Act, the UTC reviewed and ultimately approved a Qwest Performance Assurance Plan (QPAP) to ensure adequate and continuous wholesale service quality from Qwest to its competitors.[16] As approved, the QPAP is a self-

[15] Resolution on Special Access, Sponsored by the Committee on Telecommunications, Adopted by the NARUC Board of Directors, February 21, 2007.

[16] Thirtieth Supplemental Order, Docket Nos. UT-003022 and UT-003040, Commission Order Addressing Qwest's Performance Assurance Plan, April 5, 2002.

effectuating remedy plan covering 52 performance indicators intended to ensure that Qwest will make payments to CLECs and the UTC if Qwest fails to provide wholesale service to others that is equal in quality to the service Qwest provides itself. Approval of the QPAP and its availability to Qwest's competitors was a significant factor in the UTC's decision to make a favorable recommendation to the Commission for Qwest's 271 application to enter the long distance market.

In support of its forbearance request, Qwest cites its past history of providing "attractive wholesale service offerings" where it no longer has an obligation to provide UNEs.[17] Qwest made these so-called "commercial agreements" available following the Commission's decision to eliminate the availability of certain UNE-based platforms to Qwest's competitors. The UTC recently reviewed 12 commercial agreements Qwest entered into with some small CLECs for access to certain network elements that replace Qwest's UNE offerings in areas where TRRO relief has been authorized by the Commission.[18]

During our review of the commercial agreements, the UTC found that a comment element of each agreement, Section 4.6, contains a troubling provision that raises doubt about the effectiveness of these agreements as commercial replacements for existing wholesale services. In Section 4.6 of the agreements, CLECs are required to acknowledge expressly the following:

> Except as otherwise provided in this Agreement, *the Parties agree that Services provided under this Agreement are not subject to the Qwest Wholesale Change Management Process ("CMP"), Qwest's Performance Indicators ("PID"), Performance Assurance Plan ("PAP"), or any other wholesale service quality*

[17] Seattle Petition at 17.

[18] See Dockets. UT-063076, UT-063086, UT-063087, UT-073002, UT-073003, UT-073004, UT-073005, UT-073006, UT-073008, UT-073019, UT-073020 and UT-073021.

> *standards, or liquidated damages and remedies. Except as otherwise provided, CLEC hereby waives any rights it may have under the PID, PAP and all other wholesale service quality standards to liquidated damages, and remedies, with respect to Services provided pursuant to this Agreement.* CLEC proposed changes to Service attributes and process enhancements will be communicated through the standard account interfaces. Change requests common to shared systems and processes subject to CMP will continue to be addressed via the CMP procedures. [Emphasis added]

In essence, this provision means that poor wholesale performance by Qwest for services provided under its commercial agreements is no longer subject to the QPAP, which is the only remaining incentive in place to ensure reasonable and adequate wholesale service quality. As noted above, the Seattle Petition seeks forbearance from all Section 251(c)(3) obligations and elimination of application of Part 61 regulations to Qwest's interstate special access service offerings throughout the Seattle MSA. Assuming that Qwest offers some wholesale service replacement services through commercial agreements, like those previously offered for UNE-based platforms, it is likely that any replacement would include similar language relieving Qwest from its obligations under the QPAP. From the UTC's perspective, this would further erode the regulatory capacity to ensure adequate wholesale service performance.

Conclusion

Qwest's petition does not provide meaningful data or other sufficient justification to warrant the broad scope of the requested relief. Eliminating UNE availability throughout the Seattle MSA coupled with removing any effective price capping of interstate special access services would impair significantly the prospects for effective competition in the Seattle MSA, particularly in the enterprise market segment. The UTC strongly recommends that forbearance be denied at least with respect to Qwest's Section

251(c)(3) unbundling obligations and Part 61 regulatory requirements applying to its interstate special access service offerings.[19]

Respectfully submitted this 29th day of August, 2007

By: _____

David W. Danner
Executive Director
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P.O. Box 47250
Olympia, WA 98504-7250

[19] The UTC takes no position on the merits of other elements of Qwest's forbearance request at this time. The UTC may supplement its position on the Seattle Petition based on comments filed by other parties in this proceeding.